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No. 94-1039

In The
Supreme Court of the United States
October Term, 1994

ROY ROMER, *ET AL.*,

Petitioners,

v.

RICHARD G. EVANS, *ET AL.*,

Respondents.

On Writ of Certiorari to the Supreme Court of Colorado

Brief for *Amici Curiae* Anti-Defamation League, Asian American Legal Defense and Education Fund, Japanese American Citizens League, NAACP Legal Defense and Educational Fund, Inc., National Counsel of La Raza, People for the American Way, and Puerto Rican Legal Defense and Education Fund

Interest of *Amici Curiae*

Anti-Defamation League

The Anti-Defamation League (ADL) is one of the oldest civil rights organizations in the United States. It was founded in 1913 to combat anti-Semitism and to promote good will among all races, ethnic groups and religions. As set forth in its charter, ADL's "ultimate purpose is to secure justice and fair treatment to all citizens alike and to put an end forever to unjust and unfair

discrimination against and ridicule of any sect or body of citizens." For more than eighty years, ADL has been active in the fight against discrimination in employment, housing, education and public accommodations.

Asian American Legal Defense and Education Fund

Founded in 1974, the Asian American Legal Defense and Education Fund (AALDEF) is a civil rights organization that addresses critical issues facing Asian Americans through community education, advocacy, and litigation involving immigrants' rights, voting rights, labor and employment rights, and environmental justice. AALDEF also represents victims of anti-Asian violence and Japanese Americans who were incarcerated in U.S. camps during World War II. AALDEF supports the fundamental right of all persons to equal access and participation in the political process.

Japanese American Citizens League

The Japanese American Citizens League (JACL), founded in 1929, is the oldest and largest Asian Pacific American civil rights organization in the nation. The mission of the JACL is to uphold the civil and human rights of Americans of Japanese ancestry and of all people. The JACL played a prominent role in obtaining redress for Japanese Americans who were interned in concentration camps during World War II. The JACL has also worked to combat discrimination on the basis of race, ethnicity, religion, gender, and sexual orientation, to reduce the incidence of hate crimes, and to protect the right of all persons to equal participation in the political process.

NAACP Legal Defense and Educational Fund, Inc.

The NAACP Legal Defense and Educational Fund, Inc. is a national civil rights legal organization that has for more than forty years litigated on behalf of African Americans and others seeking protection from status-based discrimination and harassment based on the exercise of constitutional rights.

Important LDF cases in the area include Shuttlesworth v. City of Birmingham, 394 U.S. 147 (1969)(invalidating ordinance authorizing arbitrary prior restrainst on political protest); Garner v. Louisiana, 368 U.S. 157 (1961) (invalidating convictions of sit-in protesters for "disturbing the peace" where only conduct was courteous refusal to give up seats in "white" section of lunch counter); Brown v. Board of Education, 347 U.S. 483 (1954) (overturning principle that "separate but equal" treatment of different races does not violate the Equal Protection Clause).

National Council of La Raza

The National Council of La Raza (NCLR) is a private, nonprofit corporation dedicated to reducing poverty and discrimination, and improving life opportunities for Hispanic Americans. NCLR is the largest constituency-based national Hispanic organization, and represents nearly 200 formal affiliates — local community-based hispanic organizations — who together serve more than two million Hispanics annually in 38 states, Puerto Rico and the District of Columbia. One of NCLR's primary policy goals is to promote and strengthen civil rights enforcement laws in the area of employment, education, affirmative action, and voting rights.

People for the American Way

People for the American Way (People For) is a nonpartisan, education-oriented citizens' organization established to promote and protect civil and constitutional rights. Founded in 1980 by a group of religious, civic and educational leaders devoted to our Nation's heritage of tolerance, pluralism and liberty, People For now has over 300,000 members across the country, including Colorado. People For has been actively involved in efforts nationwide to combat discrimination and promote equal rights, including efforts to protect the civil rights of gay men and lesbians. People For regularly supports the enactment of civil rights legislation, participates in civil rights litigation, and conducts programs and studies directed at reducing problems of

bias, injustice and discrimination. The instant appeal is of particular importance to People For because the Colorado Supreme Court's decision properly rejected the unacceptable concept that gay men and lesbians are second class citizens who may be excluded from this country's political processes and denied its legal protections. It is vitally important to People For that this Court affirm that decision and the fundamental principle that all persons, including gay men and lesbians are entitled to the equal protection of the law.

Puerto Rican Legal Defense and Education Fund

The Puerto Rican Legal Defense and Education Fund (PRLDEF) was founded in 1972 to protect and ensure the civil rights of Puerto Ricans and other Latinos. PRLDEF is committed to the equal protection of the laws for all persons and strongly opposes discrimination against lesbian, gay and bisexual people, including any attempt to restrict political participation on the basis of sexual orientation.

The parties have consented to the filing of this brief; their letters to that effect have been filed separately in this Court.

Summary of Argument

The rhetoric of "no special rights," which formed much of the political campaign to pass Amendment 2 and is at the center of petitioners' arguments to this Court, is an obfuscation. This Court should look beneath the specious claim that Amendment 2 advances a populist conception of equal treatment to see this legislation as it is: Amendment 2 walls off the political and judicial fora of the State of Colorado from its gay citizens, depriving them in a particularly flagrant fashion of the equal protection of the laws. No other group of citizens in Colorado is prevented from seeking, at any level of government, to pass legislation prohibiting acts of private discrimination or public hate. No other group of persons in Colorado is prohibited from

using the State's courts to vindicate state and federal rights. Had Colorado's legislature or voters adopted a constitutional amendment reading: "The Equal Protection Clause of the Fourteenth Amendment does not apply to lesbians, homosexuals or bisexuals in this State unless reenacted by a subsequent amendment to this State's Constitution" *amici* venture to suppose that this Court would unanimously strike it down. That is the practical effect of Amendment 2, though couched in a disingenuous language of "no special rights." Strict judicial scrutiny is warranted, and we submit that the proper result of that scrutiny is the result reached by the Colorado Supreme Court.

Amendment 2, by prohibiting all of the State's legislatures and administrative agencies from outlawing violations of gay people's civil rights, infringes the most important political right in any democratic society—the right to participate equally with all other citizens in the political process. This right, as the Court's decisions have repeatedly recognized, is not limited to the right to cast a ballot and have it counted. Electoral schemes designed to cancel out the voting strength of particular groups are constitutionally suspect even if no voter is disfranchised, if a group of voters' influence on the political process "as a whole" is consistently degraded. *Davis v. Bandemer*, 478 U.S. 109, 132 (1986) (plurality opinion). Though political vote dilution cases are rare, Amendment 2 presents a textbook example. In response to a few limited political successes by gay voters, Colorado has reorganized its entire governmental structure in order to ensure that no elected official anywhere in the State will be responsive to a primary political concern of gay voters.

This attempt to reverse successes at the ballot box is not insulated from constitutional scrutiny because it took the form of a relocation of electoral decisionmaking from the local to the statewide constitutional level. This Court has repeatedly held for more than thirty years that such restructurings, if undertaken for discriminatory purposes, may violate—depending on the precise factual context—the Fourteenth and Fifteenth

Amendments or the Voting Rights Act. Petitioners' windy evocations of the State's plenary authority to reorganize its governmental structures are punctured by a single warning this Court issued long ago: "One must be ever aware that the Constitution forbids 'sophisticated as well as simple-minded modes of discrimination.'" *Reynolds v. Sims*, 377 U.S. 533, 563 (1964) (quoting *Lane v. Wilson*, 307 U.S. 268, 275 (1939)).

Meaningful political participation, guaranteed by the Fourteenth Amendment to all citizens equally, means the opportunity to seek through electoral and governmental processes the vindication of one's rights and the achievement of one's interests. Amendment 2 singles out gay people in Colorado and disables them from using the political process in ways open to all other voters. Whatever the subterfuge employed, and whatever the populist rhetoric accompanying the action, this result is repugnant to the Federal Constitution.

Amendment 2 similarly attempts, in a particularly flagrant fashion, to deny equal protection of the laws through the agency of the courts. Not only does the legislation purport to close the State courts to claims for the vindication of federal rights—a result in conflict with the clear constitutional commandments of this Court stretching back more than half a century—it also prohibits the State's courts from redressing wrongs done to State citizens against the laws of the State, if those citizens were publicly or privately wronged as a result of discrimination against gay people. This result violates First Amendment expression and association rights just as surely as Virginia's equally meretricious restrictions on civil rights litigation invalidated by this Court in *NAACP v. Button*, 371 U.S. 415 (1963). Such widespread denial of equal access to the courts is nothing more than an invitation to arbitrary and capricious discriminatory conduct; as such it violates the Equal Protection Clause.

Amendment 2's interferences with equality in political and judicial process are each independently sufficient to require

invalidation. But *amici* believe that the Court should express to the nation the full breadth of the constitutional impropriety in this case. What Colorado has done is to create a discrete and insular minority within its population, marking off a certain group and denying that group its rights in the political process and the equal protection of the laws. Historical denial of the formal protections of the law is the characteristic that distinguishes those social groups which are treated as "suspect classifications" for equal protection purposes. African-descended Americans were denied all access to the Federal courts before the Civil War, as aliens, women, and illegitimate offspring were traditionally denied legal protection by the common law to varying degrees and under varying circumstances. These are the classifications which the Court has found to trigger heightened scrutiny when legislatures disadvantage particular groups. The Court has never held that the class of suspect classes is closed. *Amici* submit that Amendment 2, by formally denying equal access to legal protections, makes the object of its hostility into a suspect classification. Strict scrutiny should be accorded to Amendment 2 because it attempts to reduce gays to the status of a powerless discrete and insular minority. The protection of our Constitutional ideals demands no less. Our own history, and the bloody course of the twentieth century, have taught us all too well what happens when minorities are denied legal protection—sooner or later individuals' very existence is at stake. The process of dehumanization begins with laws like this one. The true measure of our commitment to equality is our willingness to intervene at the first step, before our own people begin walking that fatal path.

Argument

I. Amendment 2 unconstitutionally infringes the fundamental right to participate equally in the political process

Over the past three decades, this Court has made clear in a variety of contexts that the constitutional protection of the right to vote does more than guarantee all qualified citizens the right to enter the voting booth and cast a ballot for the candidates of their choice. The "constitutional 'right' to vote," *Shaw v. Reno*, 113 S.Ct. 2816, 2819 (1993), involves a constellation of interests—an entitlement to participate in the formal election process by casting a ballot and having it counted; the use of fair rules to determine election winners; and the ability to influence post-election decisionmaking by elected representatives. See Pamela S. Karlan, *The Rights To Vote: Some Pessimism About Formalism*, 71 Tex. L. Rev. 1705, 1709-20 (1993). Amendment 2 clearly violates the right to vote as currently understood.

A. The Constitution forbids attempts to degrade a group of voters' influence on the political process as a whole

Electoral schemes that "operate to minimize or cancel out the voting strength of racial *or political* elements of the voting population ... raise a constitutional question." *Davis v. Bandemer*, 478 U.S. 109, 119 (1986) (internal quotation marks omitted). Even if a politically identifiable group remains free to go to the polls and cast its ballots for the candidates and propositions it prefers, the members' right to vote may nonetheless be unconstitutionally diluted "when the electoral system is arranged in a manner that will consistently degrade a voter's or group of voters' influence on the political process as a whole." *Id.* at 132 (plurality opinion). Moreover, this Court's

equal protection jurisprudence makes clear that the equal protection clause protects all groups of voters, whether they are defined by reference to a pre-existing status or simply in terms of their political affiliation and interests. *See, e.g., Abate v. Mundt*, 403 U.S. 182, 187 (1971) (upholding a plan in the absence of any "built-in bias tending to favor particular political interests or geographic areas"); *Whitcomb v. Chavis*, 403 U.S. 124, 149 (1971) (condemning apportionment plans "conceived or operated as purposeful devices to further racial or economic discrimination"); *Reynolds v. Sims*, 377 U.S. 533, 562 (1964) (holding that the Constitution requires "equal representation for equal numbers of people, without regard to race, sex, economic status, or place of residence within a State"); *Gray v. Sanders*, 372 U.S. 368, 379 (1963) (requiring that "all who participate in the election are to have an equal vote—whatever their race, whatever their sex, whatever their occupation, whatever their income, and wherever their home may be in that geographical unit").

Political vote dilution under the *Davis v. Bandemer* standard is exceedingly rare. The mere fact that a politically salient group consistently loses at the polls is not enough, since "the power to influence the political process is not limited to winning elections." 478 U.S. at 132. Normally, even members of the losing bloc have an equal opportunity to participate in the political process as a whole because normally, "the candidate elected will [not] entirely ignore the interests of those voters [who voted for a losing candidate]." *Id.*; *see also id.* at 152-53 (O'Connor, J., concurring in the judgment).

But Colorado's Amendment 2 presents that rare case of unconstitutionality. Amendment 2 is designed precisely to degrade a group's influence on the political process as a whole and, if allowed to stand, will have exactly that effect. Petitioners' brief and the testimony of the founders of Coloradans for Family Values—who were responsible for drafting and promoting Amendment 2—are admirably candid on this point. The impetus for Amendment 2 was the limited

success gays, lesbians, bisexuals, and their political allies had achieved through Colorado's existing political processes. *See* Brief for Petitioners at 5-6; Testimony of Wilford G. Perkins, Tr. at 736; Testimony of Anthony N. Marco, Tr. at 832-33, 837, 839, 846, 852. Amendment 2 was designed to roll back the gains gays had already achieved—before the State Legislature, in local legislative bodies, and through the persuasion of executive officials—and to ensure that gays would not be able to achieve any future political gains except through the extraordinary mechanism of a state constitutional amendment. Amendment 2 ensures that elected officials in Colorado not only will, but *must* "entirely ignore," *Bandemer*, 478 U.S. at 132, the interests of the group of voters who seek civil rights for gays, lesbians, and bisexuals, because elected officials are absolutely disempowered from responding to these constituents' concerns. Petitioners point to no other particular group of Colorado voters whose influence on the political process is similarly degraded.

B. The Constitution forbids sophisticated as well as simple-minded attempts to degrade a group's political power

A central syllogism underlying petitioners' argument goes something like this: the cases on which the Colorado Supreme Court's decision ultimately rests—*Hunter v. Erickson*, 393 U.S. 385 (1969), and *Washington v. Seattle School Dist. No. 1*, 458 U.S. 457 (1982)—were about racial discrimination in the political process; this case is not about racial discrimination; therefore this case is not about the right to participate fully in the political process.

Simply to state the syllogism is to expose the flaw in petitioners' position. That this case does not involve racial discrimination says nothing about whether it involves discrimination in the political process. Petitioners have got the argument exactly backwards. This Court's cases involving racial discrimination with respect to voting are relevant, not to

establish that discrimination against homosexuals is the same as discrimination against African Americans, but rather to shed light on the scope of the right the Colorado Supreme Court correctly located within the Fourteenth Amendment: that "the political processes ... [be] equally open to participation by the group in question." *White v. Regester*, 412 U.S. 755, 766 (1973); *see Davis v. Bandemer*, 478 U.S. at 137 (plurality opinion). The reason why so many of the salient cases in this area involve racial discrimination is that, before the upsurge of anti-gay sentiment that produced Amendment 2 and its counterparts in other jurisdictions, racial and ethnic minorities were the usual targets of this kind of sophisticated political degradation.

As this Court emphasized in *Reynolds v. Sims*, "[o]ne must be ever aware that the Constitution forbids 'sophisticated as well as simple-minded modes of discrimination.'" 377 U.S. 533, 563 (1964) (quoting *Lane v. Wilson*, 307 U.S. 268, 275 (1939)). *Reynolds*—which was not a case about racial discrimination in any form—expressly relied on *Gomillion v. Lightfoot*, 364 U.S. 339 (1960), for its understanding both of what constitutes "sophisticated" discrimination respecting the right to vote, *Reynolds*, 377 U.S. at 563, and to explain why federal judicial intervention is necessary when a state manipulates its governmental structure to disempower a discrete group of voters, *id.* at 566. *Gomillion* is similarly illuminating in understanding why Amendment 2 represents unconstitutional discrimination.

Tuskegee was (and is) a majority-black municipality within majority-black Macon County, Alabama. When, in the mid-1950's, Tuskegee's black community began to express its determination to participate in the political process, Alabama's white majority responded in three ways. First, the Macon County Board of Registrars engaged in a series of evasive maneuvers designed to prevent African Americans from registering to vote. *See United States v. Alabama*, 192 F. Supp. 677 (M.D. Ala. 1961), *aff'd*, 304 F.2d 583 (5th Cir.), *aff'd*, 371

U.S. 37 (1962) (per curiam). Second, through a statewide referendum, Alabama adopted a constitutional amendment permitting the state to abolish Macon County altogether "if the uppity Negroes there continued pestering for the vote." Bernard Taper, Gomillion v. Lightfoot: Apartheid in Alabama 51 (New York: McGraw-Hill 1962). *See* Ala. Const. Amend. No. 132 (1957), *repealed* Ala. Const. Amend. No. 406 (1982). Third, the Alabama Legislature passed Local Act 140, which redrew Tuskegee's municipal boundaries "to remove from the city all save only four or five of its 400 Negro voters [as well as several hundred other African American citizens] while not removing a single white voter or resident." *Gomillion*, 364 U.S. at 341.

In *Gomillion*, this Court held that Act 140 could be challenged under the Fifteenth Amendment, which protects only the right to vote against racial discrimination.[1] If "the inescapable human effect of this essay in geometry and geography is to despoil colored citizens, and only colored citizens, of their theretofore enjoyed voting rights," the Tuskegee gerrymander would be unconstitutional. *Id.* at 347. Although the Court acknowledged a long line of cases recognizing the states' general prerogative to organize their local governments as they saw fit, it held that it was "inconceivable" that the Constitution "would sanction the achievement by a State of any impairment of voting rights whatever so long as it was cloaked in the garb of the realignment of political subdivisions." *Id.* at 345. The broad principle to be derived from *Gomillion* is that the Constitution protects the right to vote from state efforts to manipulate political structures to deny voters "their theretofore enjoyed voting rights."

1. In *Shaw v. Reno*, 113 S.Ct. at 2825-26, the Court stated that the claim raised in *Gomillion* would have been actionable under the Fourteenth Amendment as well. *See also Gomillion*, 364 U.S. at 349 (Whittaker, J., concurring).

Suppose, though, that the Colorado Legislature were to pass a statute de-annexing the neighborhoods of Denver which it concluded were heavily populated by gay, lesbian, or bisexual voters. If this Court were to conclude that the sole purpose of the statute was to ensure that these groups would have no influence over Denver's municipal government—although they might still be subject to Denver's police power, *cf.* Tr. of Oral Arg. at 7, *Gomillion v. Lightfoot*, 364 U.S. 339 (1960) (the black community remained within Tuskegee's police power jurisdiction even after the de-annexation)—it seems inconceivable that the Court would uphold such a statute. Such a de-annexation, with its ensuing exclusion from a pre-existing political community, would be every bit as odious as the Exclusion Order challenged in *Korematsu v. United States*, 323 U.S. 214 (1944). Contrary to Colorado's suggestion, see Brief for Petitioners at 16, *Hunter v. City of Pittsburgh*, 207 U.S. 161 (1907), would provide no more of a shield for this invidious political expulsion than it did for the exclusion of blacks in Tuskegee.

The "inescapable effect" of Amendment 2 is not far removed from this hypothetical or the Tuskegee experience. Like Tuskegee's black citizens, the gays, lesbian, and bisexual citizens of Colorado alarmed the majority with their insistence on effective participation in the political process. *See, e.g.*, Testimony of Anthony N. Marco at 839 (claiming Amendment 2 was "necessary because it was obvious that the aggression of gay militants through the legislature was not going to cease"). Like Alabama, Colorado responded with an unprecedented reorganization of its political processes to ensure that local political activity would be rendered ineffectual. States "cannot foreclose the exercise of constitutional rights by mere labels," *NAACP v. Button*, 371 U.S. 415, 429 (1963), and calling Amendment 2 an allocation of authority among political subdivisions cannot disguise the fact that its purpose and effect are to deny gays, lesbians, and bisexuals the ability to pursue their interests through the regular political process.

That the relocation of electoral decisionmaking from the local to the statewide level (one of the intended effects of Amendment 2, *see* Brief for Petitioners at 5-6, 47-48) implicates voting finds further support in this Court's decisions under section 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c. That provision requires specified jurisdictions to seek federal preclearing before implementing any changes "with respect to voting." While these cases involve a statutory, rather than a constitutional, cause of action, their focus on the scope of the right to vote is nonetheless helpful.

In *Allen v. State Board of Elections*, 393 U.S. 544 (1969), for example, the Court held that a change from districted to at-large elections for a county board of supervisors required section 5 preclearance. The Court explained: "The right to vote can be affected by a dilution of voting power as well as by an absolute prohibition on casting a ballot. See *Reynolds v. Sims*, 377 U.S. at 555. Voters who are members of a racial minority might well be in the majority in one district, but in a decided minority in the county as a whole. This type of change could therefore nullify their ability to elect the candidate of their choice just as would prohibiting some of them from voting." *Allen*, 393 U.S. at 569. In more general terms, *Allen* recognizes that "changes in the composition of the electorate that may vote for candidates for a given office" affect the right to vote. *Presley v. Etowah County Commission*, 502 U.S. 491, 503 (1992).

Amendment 2 works a similar change in the composition of the electorate. Prior to the amendment, gays, lesbians, and bisexuals along with their political allies in local Colorado jurisdictions could hope to enact antidiscrimination measures. (In fact, the Boulder ordinance was adopted by popular referendum.) Now, however, voters are forbidden from adopting such measures in local elections; only a statewide referendum adopting a new constitutional amendment could authorize such legislation. *Cf.* 28 C.F.R. § 51.13(j) (1994) (requiring preclearance of "[a]ny change affecting the necessity of ... offering issues and propositions by referendum").

C. This Court's one-person, one-vote cases also support an understanding of the right to vote that embraces an equal opportunity to participate in governmental decisionmaking

As we have already pointed out, *Reynolds v. Sims* involved no allegation of racial discrimination. The Court's recognition that "the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise" thus does not depend on the presence of a racially discriminatory purpose or effect. Contrary to the suggestion in petitioners' brief, the impermissible dilution in *Reynolds* did not stem from the underweighting of the plaintiffs' votes in popular elections; there was no claim that the plaintiffs were less able than other voters to elect the representatives of their choice. Rather, the grievance centered on the fact that, *within the legislative process*, the influence enjoyed by residents of the Birmingham, Mobile, and Gadsden suburbs was underweighted relative to the influence enjoyed by voters in other parts of the state. Thus *Reynolds* recognizes that the right to vote protected by the Fourteenth Amendment extends beyond Election Day.

This consistent understanding was again evident in the Court's most recent quantitative dilution case, *Board of Estimate v. Morris*, 489 U.S. 688 (1989). There, the Court held that New York City's longstanding form of municipal governance violated the equal protection clause because the Board of Estimate—a governmental body with sweeping executive and legislative powers—was chosen in a fashion that gave residents of Brooklyn, the city's most populous borough, proportionately less influence on the Board's decisionmaking than voters from smaller boroughs enjoyed. "[I]n this country," *Morris* explained, "'each and every citizen has an inalienable

right to full and effective participation in the political processes' of the legislative bodies of the Nation, State, or locality as the case may be." *Id.* at 693 (quoting *Reynolds*, 377 U.S. at 365).

Similarly, *Hunter v. Erickson* relies on the one-person, one-vote cases, rather than the Court's race-discrimination jurisprudence, to explain the way in which the Akron charter provision injured the city's African American voters. When *Hunter* invoked *Reynolds* and *Avery v. Midland County*, 390 U.S. 474 (1968)—declaring that "the State may no more disadvantage any particular group by making it more difficult to enact legislation in its behalf than it may dilute any person's vote or give any group a smaller representation than another of comparable size," 393 U.S. at 393—it did so, *not* to explain that the Akron charter amendment affected African Americans (which it had already decided, *id.* at 390-91),[2] but rather to point out that their injury lay in the impairment of their ability to participate equally in the political process.

So too in this case. Amendment 2 singles out the gay, lesbian, and bisexual community and tells its members that they alone—among all Coloradans—are disabled from seeking antidiscrimination laws and policies through the normal political processes of government. This unique disempowerment violates the Fourteenth Amendment's requirement that the political process be equally open to all voters.

2. In this case, there is no need to conduct any sort of purpose inquiry to see that gays, lesbians, and bisexuals are the target of the Amendment. Amendment 2 does not contain the rhetorical fig leaf of neutrality—prohibiting, for example, discrimination based on "sexual orientation" generally—but explicitly singles out gays, lesbians, and bisexuals. Thus, heterosexual voters remain free to seek local ordinances, and state statutes and executive policies protecting them from discrimination on the basis of *their* sexual orientation.

II. Under the circumstances of this case, closing Colorado's courts to claims of discrimination constitutes an independent abridgment of the fundamental right to participate in the political process

The Colorado Supreme Court held that Amendment 2 closes the State's courts to claims of discrimination brought by gays, lesbians, or bisexuals: "Amendment 2 alters the political process so that a targeted class is prohibited from obtaining ... judicial protection or redress from discrimination absent the consent of a majority of the electorate through the adoption of a constitutional amendment." *Evans v. Romer*, 882 P.2d 1335, 1339 (Colo. 1994) (*Evans II*).

Litigation—particularly litigation by an identifiable, unpopular minority group seeking to vindicate its right to fair treatment—is itself a form of political activity protected by the First and Fourteenth Amendments:

> Groups which find themselves unable to achieve their objectives through the ballot frequently turn to the courts. Just as it was true of the opponents of New Deal legislation during the 1930's, for example, no less is it true of the Negro minority today. And under the conditions of modern government, litigation may well be the sole practicable avenue open to a minority to petition for redress of grievances.

NAACP v. Button, 371 U.S. 415, 429-30 (1963); *see Lehnert v. Ferris Faculty Association*, 500 U.S. 507, 528 (1991) (plurality opinion) ("We have long recognized the important political and expressive nature of litigation"); *cf. Bounds v. Smith*, 430 U.S. 817, 828 (1977) (noting "the fundamental constitutional right of access to the courts").

Just as "association for litigation may [have been] the most effective form of political association" for African Americans in

Virginia in the early 1960's—when "the militant Negro civil rights movement [had] engendered the intense resentment and opposition of the politically dominant white community of Virginia," *NAACP v. Button*, 371 U.S. at 431, 435—so too, litigation may today be an especially effective form of political association for gays in light of the state's concession that their civil rights movements engendered the intense resentment and opposition of the politically dominant straight community in Colorado that produced Amendment 2. *See, e.g.*, Testimony of Anthony N. Marco, Tr. at 846 ("The primary intention [of Coloradans for Family Values in drafting Amendment 2's language] was to resist statewide aggression on the part of gay militants").

But as the Colorado Supreme Court interpreted Amendment 2, that avenue of political association is barred. Assuming arguendo that discrimination on the basis of sexual orientation need withstand only rational relationship scrutiny,[3] gays are nonetheless protected by the Equal Protection Clause's ban on arbitrary or irrational treatment. As this Court explained in *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985), even when rational relationship scrutiny is appropriate, States

> may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational. Furthermore, some objectives—such as a bare ... desire to harm a politically unpopular group—are not legitimate state interests.

Id. at 446-47 (internal quotation marks and citations omitted); *see also Zobel v. Williams*, 457 U.S. 55, 61-63 (1982); *United States Dept. of Agriculture v. Moreno*, 413 U.S. 528, 534-35 (1973).

3. We argue in the next part of this brief that Amendment 2 *creates* a suspect class.

Amendment 2 permits precisely such denials of equal protection. Suppose, for example, that a Colorado municipality passed an ordinance that required any gay person entering the town to register with the local police department. Or suppose that a community college with otherwise open enrollment refused to allow lesbians to participate in physical education classes. Such treatment would almost certainly violate the Equal Protection Clause. It is impossible to imagine a legitimate state interest that these policies could serve; they would seem either completely irrational or motivated solely by a desire to injure a politically unpopular group.[4]

Litigation is, of course, the only practicable way that Colorado's gay, lesbian, and bisexual citizens, and their allies, can attack such discrimination, since Amendment 2 bars them from seeking relief through the partisan political processes. As to these issues, they are every bit as "disenfranchised," at least in the short run, as Virginia's African American citizens were at the time of *NAACP v. Button*. Thus, concerted litigation activity is the only realistic avenue for their political organization and advocacy.

Nonetheless, on its face, Amendment 2 would require the Colorado courts to dismiss lawsuits brought under 42 U.S.C. § 1983, since the gravamen of each lawsuit would be a "claim of discrimination" on the "basis" of sexual orientation. Thus, Amendment 2, on its face, violates the Supremacy Clause, which provides, in pertinent part, that the "Constitution, and the Laws of the United States which shall be made in Pursuance thereof ... shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI. *See also Howlett v. Rose*,

4. Given the evidence of irrational animus and bigotry in the record below, this Court should conclude, despite petitioners' unconvincing platitudes about religious freedom and uniformity, that a constitutionally illegitimate desire to harm an unpopular group is *precisely* Amendment 2's objective.

496 U.S. 356, 379 (1990) (the fact that state law would offer no remedy cannot close the state courts to section 1983 lawsuits); *Testa v. Katt*, 330 U.S. 387, 389 (1947) (the Supremacy Clause requires state courts to entertain lawsuits based on federal law).

Petitioners admit the federal constitutional difficulty with according Amendment 2 its natural construction: "recognizing the constitutional supremacy problem created when a state court cannot entertain a federal cause of action, the amendment prohibits only the enforcement of *state* or *locally based* claims of discrimination." State's Trial Brief at 9-10 (citation omitted). But this attempted rescue is unavailing. First, the Colorado Supreme Court did not in fact construe Amendment 2 to avoid this constitutional infirmity. The question whether Amendment 2 is severable in this fashion is purely a question of Colorado law, and would have to be resolved in the state's courts, not by this Court's interpretive reconstruction.

Second, given Amendment 2's restriction on the use of litigation to achieve political objectives, this Court cannot save the amendment through a narrowing construction. *See O'Brien v. Skinner*, 414 U.S. 524, 530 (1974).[5] Thus, unless this Court is prepared to hold that Colorado may bar even politically expressive lawsuits raising federal constitutional and statutory claims, it must invalidate Amendment 2 as a violation of the First and Fourteenth Amendment-based right to participate equally in the political process through litigation. To bar the state's courthouse doors to gays, lesbians, and bisexuals raising federal-law claims, while leaving those doors open to all other individuals, violates the Equal Protection Clause. *See* Laurence Tribe, American Constitutional Law § 16-11, at 1463 (2d ed. 1988) (*Button* and its progeny reflect "an ideal that binding decision mechanisms not be structured so as to exclude any

5. Moreover, under *NAACP v. Button*, this Court "will not presume that the statute curtails constitutionally protected activity as little as possible. For standards of permissible statutory vagueness are strict in the area of free expression." 371 U.S. at 432.

identifiable group, no matter what claims the group seeks to advance").

Moreover, even if the Colorado courts remain open to claims arising under federal law, that would not save Amendment 2. The state courts must equally be available for claims of discrimination that arise under state law. Suppose, for example, that a lesbian plaintiff were to bring a garden-variety personal-injury lawsuit. At a bench trial, the judge rules against her on the grounds that because she is a lesbian her testimony is inherently incredible and he believes in any event that lesbians "deserve" whatever misfortunes come their way. *Cf. Judge Is Censured for Remark Over Homosexuals*, N.Y. Times, Nov. 29, 1989, at A1 (reporting the censuring of a Texas trial judge who gave a lighter sentence to a murderer because his victims were homosexual). Such beliefs are clearly both irrational and impermissible. Courts, like all other governmental actors, are bound by the equal protection clause. *See Shelly v. Kraemer*, 334 U.S. 1 (1948). Amendment 2, however, would foreclose an appeal raising a state equal protection/due process clause claim under Colo. Const. Art. II, § 25. To the extent that a Colorado appellate court ordered lower courts or other branches or agencies of the state government to comply with principles of basic fairness, it would be requiring the adoption of nondiscrimination "policies," precisely the outcome Amendment 2 prohibits. The potential for such arbitrary and capricious discrimination in the judicial process renders Amendment 2 unconstitutional.

III. Constitutional provisions closing the ordinary political and judicial fora to a particular group of citizens seeking protection of their right to equal treatment are subject to strict scrutiny, because they have the effect of the making the affected group a "suspect class"

As we show in Part II, *supra*, Amendment 2, by its express language and as authoritatively construed below, prohibits Colorado's courts from entertaining the antidiscrimination claims of gay people arising under Federal and State law. In addition to the reasons previously advanced for holding that such a provision violates the right to political participation protected by both the Equal Protection and Due Process Clauses of the Fourteenth Amendment, we submit that any such attempt to close both political and judicial fora to claims of unconstitutional discrimination by a particular social group *renders* that group a suspect class. Amendment 2 thus requires strict judicial scrutiny under the Fourteenth Amendment's Equal Protection Clause. No state interest identified by petitioners in defense of Amendment 2 is sufficiently compelling to save it from constitutional invalidation.

A. The suspect classifications presently recognized reflect past pervasive denials of legal protection to particular disfavored groups

It should be clear from the outset that we are not arguing that gays and bisexuals comprise a suspect class for all equal protection purposes throughout the country. We contend rather that by adopting Amendment 2, the voters made gay and bisexual persons within the State of Colorado a suspect class.[6]

6. Petitioners assert in their opening brief that the Colorado District Court rejected respondents' argument that gays and bisexuals are for all equal protection purposes a suspect classification. Petitioners' Brief, at 17 & n.8 (citing cases in accord). Astonishingly, petitioners also maintain that all related argument on this important point is waived or "not preserved" by respondents' failure to appeal from the favorable judgment in the Colorado Supreme Court. *Id.* This is nonsense. The State District Court's ruling on the issue of suspect classification was not certified as final and could not have been appealed in the first place. More importantly, respondents and *amici* are of course entitled to defend the result below on any ground broad enough to support the judgment. *Dandridge v. Williams*, 397 U.S. 471, 475 n.6 (1970). Petitioners' haste to employ an entirely specious waiver argument indicates awareness of the fundamental constitutional infirmity of Amendment 2.

This Court has been appropriately reluctant to find particular legislatively-defined categories so fundamentally at odds with our constitutional values as to require strict scrutiny of each legislative act based upon such categories. Only race (meaning the anthropologically invalid but socially significant distinction between "White," "Black," and "Asian" and other persons) and national or ethnic origin are distinctions whose legislative employment always results in strict scrutiny under the Equal Protection Clause.[7] But this Court has never held that the class of suspect classes is closed. To the contrary, this Court's cases explaining what makes a class suspect show why Colorado has here brought into existence a new class requiring the protection of strict scrutiny.

Whether Equal Protection doctrine demands employment of two tiers of "heightened review" of legislative classifications in addition to rational-basis testing, *see, e.g.*, *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440-41 (1985); *Mississippi University for Women v. Hogan*, 458 U.S. 718, 724 (1982), or embodies a single standard of rationality review under which certain classifications must be more energetically justified, *see Cleburne*, 473 U.S. at 452-54 (Stevens, J., concurring), has been long debated among the Justices of this Court. But all Justices participating in the discussion have apparently agreed that the "lengthy and tragic history" of dis-

7. *See Loving v. Virginia*, 388 U.S. 1, 11 (1967) (race); *Korematsu v. United States*, 323 U.S. 214, 216 (1944) (nationality of ancestry or ethnic origin). *Cf. Graham v. Richardson*, 403 U.S. 365 (1971) (classification by condition of alienage sometimes strictly scrutinized).

crimination against various social groups, *see University of California Regents v. Bakke*, 438 U.S. 265 (1978) (opinion of Powell, J.), has contributed to the perceived need for closer scrutiny of legislative characterizations that harm their interests. No doubt there has been a lengthy and tragic history of oppression, discrimination and violence directed at gay people in our society, but once again *amici* do not predicate their argument on this ground. Instead, we ask rather what began that lengthy history with respect to other suspect classes. In each case, we contend, it is acts of legislative or other authoritative power that mark off a "discrete and insular minority" identified as "not as worthy or deserving as others" of protection under the law. *See United States v. Carolene Products Co.*, 304 U.S. 144, 153 n.4 (1938); *Cleburne*, 473 U.S. at 440-41.

When the Supreme Court held that the Federal Constitution was made by men who believed that African-descended slaves "had no rights which the white man was bound to respect," *see Scott v. Sandford* 60 U.S. 393, 407 (1857), it placed such people quite literally outside the protection of the federal legal system. The common law traditionally deprived aliens of most or all of its benefits; no less an authority than Littleton states that aliens could bring no actions in the King's courts as late as the opening of the sixteenth century. *See* T. Littleton, *Tenures* § 198; 9 W.S. Holdsworth, *History of English Law* 91-99 (1926). The common law as the framers of our Constitution learned and practiced it excluded married women from the separate protection of the law, as it prohibited "illegitimate" offspring from many of the civil rights enjoyed by other citizens. *See* 1 W. Blackstone, *Commentaries on the Law of England* *442-45, *459. The history of subsequent societal discrimination against such groups is horrifying indeed, but the feature distinguishing them from other groups also historically mistreated but not defined as suspect classes under the Equal Protection Clause is that of deliberate exclusion from legal protection. Gender, illegitimacy, and alienage are all "quasi-suspect" in equal protection doctrine, we submit, as a consequence of the history of partial exclusion from legal protection. Race occupies its unique position in American constitutional law because of the unique condition of legal exclusion to which African-descended persons were subjected for generations.

B. Depriving a group of the benefit of equal protection by prohibiting courts and legislatures from rectifying discrimination makes the group a suspect class

Thus, we maintain, the suspect classes recognized under this Court's Equal Protection doctrine are groups to whom the full formal protection of the law has been denied. This formal denial of legal protection then generates or coexists with other forms of societal discrimination and mistreatment. One page of this history, Justice Marshall said, was "worth a volume of logic" in defining suspect classes under the Equal Protection Clause. *Cleburne*, 473 U.S. at 472-73 n.24, (Marshall, J., concurring in part and dissenting in part) (quoting *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921) (Holmes, J.)).

In one of the infrequent attempts to give a functional definition of the indicia of a suspect class, the Court has said that groups comprising a suspect class are "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973). No more relevant disability can be imagined than a State constitutional provision prohibiting any court or legislature within the State from remedying discrimination, no matter how arbitrary or irrational, aimed at a particular group of citizens. *Amici* submit that such a State constitutional provision makes the group against which it is aimed a suspect class, precisely as past formal exclusions from legal protection have made the groups at which they were directed suspect or quasi-suspect classes. The

provision itself must be justified by a compelling state interest, and all subsequent legislation differentially affecting that group within the State should receive the same treatment.

C. Amendment 2 creates a discrete and insular minority in Colorado whose members are uniquely prohibited from seeking enforcement of the Fourteenth Amendment in their own State

This is precisely the situation created in Colorado by the adoption of Amendment 2. Gay people alone are prohibited from using the legislatures and courts of the State to counteract discrimination forbidden by the Federal Constitution. They may not seek legislation designed to overcome any statutes, regulations, judicial decisions or administrative actions reflecting "prejudice," "antipathy," or "a bare desire to harm a politically unpopular group." *Cleburne*, 473 U.S. at 440, 446-47. The courts of the State are closed to them for the vindication of federal rights which under Article VI of the Federal Constitution the State's judges are sworn to protect. Amendment 2 "tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities," for which reason the Court should accord "a correspondingly more searching judicial inquiry," under which Amendment 2 must be justified by compelling state interests. *See Carolene Products*, 304 U.S. at 153 n.4.

Amendment 2 does, as respondents maintained below and as the Colorado Supreme Court found, deprive gay people of effective political participation. But this Court should find Amendment 2 repugnant to the spirit of the Equal Protection Clause for broader and more urgent reasons. As the Justice who did more than any other lawyer of the century to define the effective meaning of equal protection wrote, "[t]he discreteness and insularity warranting a 'more searching judicial inquiry' must ... be viewed from a social and cultural perspective as well

as a political one. To this task judges are well suited, for the lessons of history and experience are surely the best guide as to when, and with respect to what interests, society is likely to stigmatize individuals as members of an inferior caste or view them as not belonging to the community." *Cleburne*, 473 U.S. 473 n.24 (Marshall, J., concurring in part and dissenting in part) (citation omitted). The Justices of this Court are the final defenders of the rights of all stigmatized individuals. At the end of the day, this Court's willingness to engage in "searching judicial inquiry" is the only protection against acts of reckless discriminatory populism like Amendment 2.

None of the interests identified by petitioners in support of Amendment 2 even begins to justify the abhorrent creation of a discrete and insular minority forbidden to apply to the courts or to state or local legislatures and administrative agencies for remedies against acts of private or public hate. Petitioners claim that the amendment is justified by the limited resources available for antidiscrimination enforcement; "anti-discrimination protections," they assert, "should be reserved for those who are particularly deserving of special protection." Petitioners' Brief, at 13. This is unparalleled constitutional effrontery, attempting to justify uniquely disadvantaging legislation on the ground that the group against which it is aimed is undeserving of basic legal equality. Petitioners also claim that Amendment 2 is justified because "a single uniform rule has inherent advantages for efficient law enforcement." *Id.* Would the allegedly compelling interest in statewide uniformity have justified officials of the State of Arkansas in prohibiting integration of the Little Rock public schools, despite local officials' willingness to meet their constitutional responsibilities, because school boards elsewhere in Arkansas continued to resist the judgment of this Court? *Cf. Cooper v. Aaron*, 358 U.S. 1 (1958).

Most astonishingly of all, petitioners claim that Amendment 2 is supported by the State's interest in the principle "which has variously [*sic*] been described as 'that

government is best which governs least.'" Petitioners' Brief, at 13, 46. Perhaps, as petitioners claim, this was the theory of Thomas Paine, or Henry David Thoreau, or even Thomas Jefferson. *See id.* at 46 n.33. But it is not the theory of our Constitution. So long as the Fourteenth Amendment remains part of the supreme law of our land, that government is best which does not deny to any person within its jurisdiction the equal protection of the laws.

Conclusion

Amici urge this Court to affirm the judgment of the Colorado Supreme Court.

Respectfully submitted,

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